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No. 04-1220

Supreme Court, U.S.
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In The

# Supreme Court of the United States

BOBBIE OSBURN,

*Petitioner,*

v.

ATLANTA CENTER FOR DERMATOLOGIC DISEASES AND DR. GILBERT GOLDMAN,

*Respondents.*

**On Petition For Writ Of Certiorari To The Georgia Court Of Appeals**

## REPLY TO BRIEF IN OPPOSITION

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## REPLY TO BRIEF IN OPPOSITION

Respondents have included in their opposition two alternative arguments, neither of which addresses the issues raised in the Petition For Writ of Certiorari. Nor does Respondent provide any reason to deprive this Court of important constitutional and statutory review.

Respondents first ask this Court to abrogate Petitioner's vested rights under Georgia Appellate Court rulings which barred only those rights that had not yet vested. Then, Respondents insist that Petitioner did not properly preserve error in the court below even though Respondents themselves offer citations to the relevant text in both the Georgia State Court and Georgia Appellate Court where the constitutional issues were preserved.

If Respondents' approach is adopted, ordinarily diligent persons will be denied free access to the courts for a time sufficient to protect vested rights. Such an approach is prohibited by this Court, the equal protection clause of the United States Constitution, and the due process clause of the United States Constitution. *U.S. Const. Amendment XIV, § 1, U.S. Const. Amendment V* (*See also* Petition p. 17).

## REASONS FOR GRANTING THE PETITION

Included in the class barred by the five year statute of repose are those who did not sleep on their rights but whose very injury is defined by its dormancy. Petitioner is deprived of due process and equal protection because the five year statute of repose operates to bar a legally cognizable cause of action.

Petitioner urges that a more rigorous scrutiny be applied before the lower court may nullify such sacred rights. Sacred rights unlike those in the cases cited by Respondent because of one important difference. The sacred rights in this case vested before the statutory time bar.

Supreme Court Rule 10 indicates that the issues presented here are of the character under which judicial discretion may be exercised to grant the petition for a writ of certiorari. Sup. Ct. R. 10. When a state court has decided an important federal question which has not been but should be settled by this Court or has decided an important federal question in a way that conflicts with relevant decisions of this Court, the federal question is of the character the Court will consider.

Not only does Petitioner present an important question of federal law with respect to her equal protection and due process claims, the Georgia lower court's ruling is contrary to controlling rules of the Supreme Court, and to controlling rules of the State of Georgia. For the past seventy-four years, this Court has without exception prohibited abrogating a vested right without providing alternative relief. (Petition p. 17). The statute of repose operates to bar an existing cause of action; exposure to silicone, which Petitioner has a vested right to pursue.

However, while the statute denies Petitioner "the right to unfettered access to the courts," the same right of access is not infringed upon for those medical malpractice plaintiffs who suffered from a misdiagnosis or foreign object left in the body.

To deprive victims like Petitioner Osburn due process of law and equal protection by extinguishing vested rights,

not by procrastination, but by an unreasonable and arbitrary time bar which is tolled only for certain victims of malpractice and not other victims of malpractice without a substantial basis or reasonable basis to do so is unconstitutional.

## I. O.C.G.A. § 9-3-71(b) DEPRIVES PETITIONER OF DUE PROCESS AND EQUAL PROTECTION BECAUSE IT OPERATES TO BAR AN EXISTING CAUSE OF ACTION BY AN ARBITRARY TIME BAR WHICH IS TOLLED ONLY FOR CERTAIN VICTIMS OF MEDICAL MALPRACTICE

This is not a case where the Georgia legislature has barred a future cause of action. This is a case where vested rights are being divested. Not one of the cases which Respondent cites in his opposition is pertinent to this case because each case involves a future cause of action with rights vesting *after* the statutory time bar.

Silicone injections are labeled by the FDA as an illicit practice. A practice which the FDA has not approved for cosmetic purposes. (Petition pp. 6-7). The FDA further has prohibited doctors from marketing or promoting silicone injections. Any cosmetic use of silicone injections is off-label. Id. Yet, Respondent injected seven rounds directly into Petitioner's face without advising her of its status as an unapproved off-label injection or of the risks involved. The injections occurred well within the statue of repose. It was only Petitioner's discovery of an already existing right which occurred outside the statute of repose. In the present case then, the statute of repose prevents the prosecution of a fresh rather than a stale cause of action because the exposure to the silicone itself was the wrong. Because

each case cited by Respondent involves victims with stale causes of action, they have no bearing on this case. (Respondent's Brief pp. 3-5).

Even though Petitioner's physical injury did not occur until late March of 2000, when Petitioner for the first time woke up with bumps and swelling on her face, the statute of repose still operates to prevent the prosecution of a fresh rather than stale cause of action, depriving Petitioner of due process and equal protection under the Georgia Constitution and the United States Constitution.

While Georgia Courts have long recognized that it is inequitable and unjust for a statute to run if a medical malpractice plaintiff is unaware that a cause of action exists, (Petition p. 9) the courts have remedied this apparent injustice for certain types of medical malpractice plaintiffs to the exclusion of other medical malpractice plaintiffs like Petitioner. "Unfettered access to the court" is permitted only when the tort is caused by a misdiagnosis or a foreign object left in the patient's body.

Recognizing that it is not possible to reasonably discover the misdiagnosis until it causes physical symptoms, or the foreign object until it is treated, the statute commences from the date the misdiagnosis is discovered, *Whitaker v. Zirkle*, 188 Ga.App. 706, 374 S.E.2d 106 (1988), and the statute of repose is not even applicable to cases where foreign objects are left in the body. *Abend v. Klaudt*, 243 Ga.App. 271, 531 S.E.2d 722 (2000).

It is undisputed that at Respondent's suggestion, Petitioner received continuous rounds of silicone injections without any warning of the associated dangers or of Respondent's off-label use. (Petition pp. 6, 16). The date of the last injection was December 18, 1995, which was four

years after the FDA noted that it had not approved liquid silicone injections for any purposes (R.2) and during the time in which reports of untoward outcomes were well known within the dermatologic community (R.2) but Petitioner was not informed of any of the risks. This constitutes a deviation from the standard of care because Petitioner's consent was not informed. (R.2).

Each time Petitioner received an injection, Respondent implicitly and explicitly repeated his failure to give any warnings or discuss the risks involved and also violated the FDA's restriction against promoting silicone for cosmetic use. Nonetheless, Petitioner was symptom free until late March of 2000. Petitioner does not allege that this failure to warn caused the injury; the basis of Petitioner's claim is that the subsequent physical deformation would not have occurred if the injection itself was never administered. Without any indication of associated risks or any facial eruptions prior to late March of 2000, the action must survive until discovery of the negligence.

Petitioner's injury occurred within the statute of repose. Her discovery of the injury occurred outside the statute of repose. And it is only by the court's own arbitrary classification of misdiagnosis plaintiffs, and foreign object plaintiffs, which has separated Petitioner from access to the courts for a length of time sufficient to protect her rights.

To deprive victims like Petitioner Osburn due process of law and equal protection by extinguishing vested rights, not by procrastination, but by an unreasonable and arbitrary time bar which is tolled only for certain victims of malpractice and not other victims of malpractice without a substantial basis or reasonable basis to do so is unconstitutional.

## II. PETITIONER PRESERVED ERROR IN THE COURT BELOW

An apparent oversight by the Georgia Court of Appeals caused the court to erroneously rule that Petitioner challenged the constitutionality of the medical malpractice statute of repose for the first time on appeal. It is plain that Petitioner raised the constitutional challenge first that the trial court level (Petitioner's App. 13-15) and again at the appellate level (Petitioner's App. 18-21) and finally at oral argument (*see* App. 1-2); in other words at every possible opportunity.

Recognizing that "rules of practice and procedure are devised to promote the ends of justice, not to defeat them," this Court held that "a rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." *Hormel v. Helvering*, 312 U.S. 552, 61 S. Ct. 719, 85 L.Ed. 1037 (1941). It would be fundamentally unjust to decline consideration of an issue which was properly raised but not properly acknowledged.[1]

---

[1] Even the Georgia Appellate Court recognizes that erroneous judicial commentary may result in a grave miscarriage of justice or affect the fairness or reputation of the judicial proceeding. *Zachary v. State*, 262 Ga.App. 646, 586 S.E.2d 346 (2003). Under the plain error doctrine, the Court of Appeals will consider issues even when they are not raised and ruled upon in the trial court when the "error is clearly erroneous." Id. Ruling that the constitutional issue was not preserved is an error which is clearly erroneous and thus qualifies for consideration under the plain error doctrine.

## CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review and reverse the judgments below. In the alternative, Petitioner requests that this Court reverse and remand this case to the Georgia Supreme Court for further proceedings.

Respectfully submitted,

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**IN THE STATE COURT OF FULTON COUNTY**
**STATE OF GEORGIA**

| | | |
|---|---|---|
| BOBBY OSBURN,<br>PLAINTIFF,<br>VS.<br>DR. GILBERT GOLDMAN AND ATLANTA CENTER FOR DERMATOLOGIC DISEASES, P.C.,<br>DEFENDANTS. | ) | CIVIL ACTION<br>NO. 02-VS-030141-B |

TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE PATSY Y. PORTER, JUDGE, ON JUNE 16, 2003, AT ATLANTA, GEORGIA.

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THE FDA HAD NOT APPROVED LIQUID SILICONE FOR INJECTION FOR COSMETIC PURPOSES.

IN THE LAST PART OF HIS DEPOSITION, HE FINALLY ADMITTED THAT: I USE LIQUID SILICONE IN AN OFF LABEL USE.

LIQUID SILICONE WAS APPROVED ONLY FOR COSMETIC SURGERY IN TERRIBLY DEFORMED PEOPLE. THAT'S NOT WHAT WE HAVE HERE WITH BOBBY OSBURN. IT WAS SIMPLY TO GET SOME SMILE WRINKLES AND THINGS ELIMINATED FROM HER FACE. SHE NOW HAS TO GO THROUGH SERIES AND SERIES OF INJECTIONS TO – I MEAN SURGERY TO REMOVE THE SILICONE THAT FLOATS ABOUT HER FACE, AND THAT'S HER DAMAGE.

WE HAVE RAISED ONE ISSUE IN THIS CASE, AND I WILL TOUCH ON IT BRIEFLY, BECAUSE I THINK BOTH COUNSEL AND I KNOW THAT THIS CASE IS ULTIMATELY HEADED TO ANOTHER COURT, AND THAT'S THE CONSTITUTIONALITY.

WE HAVE AGAIN RAISED THE CONSTITUTIONALITY OF ONLY A FIVE-YEAR STATUTE OF REPOSE FOR DOCTORS WHEN ALL OTHERS IS A TEN-YEAR STATUTE OF REPOSE. IF THERE EVER IS A SITUATION FOR UNPREFERENTIAL TREATMENT, IT WOULD NEED TO BE THE MEDICAL PROFESSION, BECAUSE AS THE COURT IS WELL AWARE FROM THE JURY CHARGES THAT IT GIVES TO JURIES IN MEDICAL MALPRACTICE CASES, THAT A DOCTOR IS PRESUMED TO GIVE GOOD CARE; THAT THE PATIENT HAS NO OBLIGATION OR DUTY TO INVESTIGATE WHAT THE DOCTOR HAS

* * *